CAMPANER LAW

ATTORNEY - CLIENT PRIVILEGE IN SPAIN

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In these lines I will give an overview of the current situation of the attorney-client privilege in criminal proceedings in Spain.

First of all, here is the legal framework:

- Section 24.2 of the Spanish Constitution provides for the fundamental right to defence (which obviously implies the secrecy of communications between the suspect and their lawyer).

- Section 542.3 of the Organic Law on the Judiciary establishes the obligation of lawyers to keep facts or news secret when they become aware of it in the course of their professional activity, and protects them from being forced to disclose such facts.

- Section 199.2 of the Spanish Criminal Code severely punishes the professional who, in breach of his obligation of secrecy or confidentiality, discloses the secrets of another person.

- Section 51.2 of the Organic Law of Penitentiary System sets forth that the communications of inmates with their defence attorney or with the lawyer expressly called in with relation to criminal matters, shall be held in appropriate locations and may not be suspended or intercepted *except* by order of the judge and in cases of terrorism.

I would like to highlight the *milestone* which was the ruling of the criminal chamber of the Spanish Supreme Court 79/2012, February 9.

Failure to comply with Section 51.2 in the *Gürtel* case led to the conviction of the famous former investigating judge Garzón, who intercepted the communications between the defendants in custody and their lawyers, even though it was not a case of terrorism and, as he admitted himself, there was no evidence to believe that the lawyers were involved in wrongdoing. During the questioning of the suspects, both Garzón and the prosecutor knew perfectly well what answers the investigated parties

were going to offer and they even boasted about it, thereby destroying their right to defence.

In the Spanish Criminal Procedure Code there are several mentions of legal privilege:

- Section 416.2 (the defence lawyer is exempt from the obligation to testify);

- After the reform brought in by Law 13/2015, October 5, Section 118 expressly envisages that all the communications between the investigated person and their lawyer are confidential. Moreover, if these communications are recorded during the investigation the judge shall order them to be deleted.

The above is not applicable when there is evidence against the lawyer, so if there are more than suspictions to conclude that the lawyer participated in the investigated facts or that he/she is involved in the commision of other offences. So this Section envisages the so-called *crime fraud exception,* which, in any event, had been used by our Courts before the reform to prosecute lawyers (legal privilege does not give us free licence to commit crime). The problem was, and still is, to determine what level of strength is required to intercept communications with the lawyer. It is very difficult to establish an objective parameter so a certain discretion of the judge comes into play and, with that, legal uncertainty.

Coming back to confidentiality, there are several *problems in practice* with carrying out such recording. We constantly observe police wrongdoing because they report to the Judge all the conversations recorded and transcribed by them, including the ones between client and lawyer, so the Judge *reads* what he/she is not supposed to know and this could create *prejudice* against the suspect and/or their lawyer.

The worst is that on some occasions the police analyse confidential conversations and explain in a separate report the defence strategy or even conclude, thanks to the conversations which they were not allowed to take into consideration, the commision of a crime by the lawyer. This happened recently in a well-known case in Spain (*Lezo* case), where an important suspect was recorded talking on the phone with his defence lawyer and they seem to induce forgery by obtaining a medical report claiming that the former (87 years old) was suffering from flu and required rest, thus obtaining a adjournment of his questioning before the investigating judge. Thanks to this information, the lawyer, the suspect and his

doctor were prosecuted and will face trial soon because the higher courts didn´t consider the evidence to be improperly obtained nor confidential because it arose coincidentally during a criminal investigation.

In this case, the lawyer whose conversations with his client were tapped filed a criminal complaint against the investigating judge, which was dismissed by the Supreme Court (Ruling February 6, 2019), holding that there is no way that a lawyer can guarantee a client that their telephones will not be tapped. So once the investigating judge has allowed the tapping of a suspect´s phone, the accidental recording of conversations related to legal defence, is not a legal cause for stopping the taping, even though it obliges the removal of the specific conversation.

Therefore, the conclusion is that even though there is no doubt about the recognition of confidentiality, in fact, we live in a system where the investigators take advantage by playing the role of *Big Brother*. And the Supreme Court is aware of that since they try to nuance their own precedent by warning that in these cases there must be an empowerment of judicial control to guarantee that the investigation is not reoriented taking advantage of the content of the (undue) revealed defence advice.

In my opinion, it is actually a *naive* way of thinking and it is impossible to control whether the police (or even the prosecutor or the investigating judge) has used this information.